Supreme Court, U.S.
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No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents do not seriously dispute that, on the facts actually found by the district court and accepted by the court of appeals, they were not seized. Instead, respondents defend the judgment below by asserting new facts—facts that respondents never pressed in the district court, that are not supported by the record before that court, and that formed no part of the court of appeals' decision in this case. To the extent respondents rely on the actual facts found by the courts below, their argument largely reduces to the claim that *every* police-citizen interaction on a bus is inherently coercive and thus constitutes a seizure absent warnings of the right to refuse consent. That claim cannot be sustained.

I. The Court Of Appeals Effectively Established A Per Se Rule That Bus Passengers Are Seized Absent A Warning Of The Right To Refuse Cooperation

A. Respondents begin (Br. 10-13) by attempting to reframe the issue before the Court. The court of appeals, respondents contend, did not address whether they had been "seized" within the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991). Instead, respondents assert that the judgment below rests on the conclusion that

their consent to the search was "involuntary" within the meaning of *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

That contention lacks merit. In *Bostick*, this Court addressed the validity of a bus passenger's consent to a search, framing the question before it as whether the interaction between the officer and the passenger was a "seizure." 501 U.S. at 433. The Court held that the police do not seize bus passengers by approaching them, asking for identification, and requesting consent to search, absent "police conduct [that] would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 439. The test is an objective one and presupposes a reasonable innocent person. *Id.* at 438. Respondents do not dispute that, in this case, the court of appeals applied the *Bostick* standard, asking whether "the facts and circumstances surrounding the search indicated that 'a reasonable person . . . would not have felt free to disregard [the agents'] requests." Pet. App. 6a (quoting *United States* v. *Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998) (quoting *Bostick*, 501 U.S. at 439)). The court of appeals did not even allude to the voluntariness formula established in *Bustamonte*, which requires courts to ask whether the citizen's "will has been overborne and his capacity for self-determination critically impaired," 412 U.S. at 225. Indeed, the court of appeals refused to consider respondents' individual characteristics, such as their age, education, and law-enforcement experience—factors that, under *Bustamonte*, are ordinarily relevant in determining voluntariness, 412 U.S. at 226—because the *Bostick* seizure test "is an objective one." Pet. App. 8a n.6 (citing *Bostick*, 501 U.S. at 438). Finally, respondents do not deny that they urged the court of appeals to apply the *Bostick* seizure standard. See Brown C.A. Br. 25-27, 35.

Respondents thus do not dispute that this Court's decision should turn on an application of the *Bostick* standard, *i.e.*, on whether the "police conduct would have communicated to a reasonable person that the person was not free to decline the

officers' requests or otherwise terminate the encounter." 501 U.S. at 439. Respondents merely attach a different legal label ("voluntariness" rather than "seizure") to that inquiry. Respondents, moreover, offer no reason to think that applying the "voluntariness" rather than "seizure" label makes a difference in this case. If an officer "communicates the message" that a passenger is not permitted to decline his requests—thus seizing him under *Bostick*—the passenger's consent is not voluntary.

Respondents' sole basis for asserting that the court of appeals found involuntariness and not a seizure is the court's description of its inquiry as bearing on "whether the consent given by each defendant for the search was 'uncoerced and legally voluntary.'" Pet. App. 2a. This Court's decision in *Bostick*, however, at times frames the seizure issue similarly. See, *e.g.*, *Bostick*, 501 U.S. at 439 (explaining that the location of the encounter is "one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary"). Indeed, the Court emphasized that consent validates a search "*only* if the cooperation is voluntary. 'Consent' that is the product of official intimidation or harassment is not consent at all." *Id.* at 438. And the Court specified that the issue "on remand [was] whether Bostick chose to permit the search." *Ibid.* Yet *Bostick* is unquestionably a *seizure* case. This case is as well.

B. Respondents also argue that the court of appeals did not establish a de facto requirement that officers must warn bus passengers of their right to refuse consent. Resp. Br. 14-20. That contention is contrary to their position before the district court, where they contended that "[t]he Eleventh Circuit has made it fairly clear that they're going to insist that police officers tell the passengers they have a right to refuse the search or they're going to find the searches illegal." J.A. 119. See J.A. 120, 127; U.S. Br. 30.

Respondents rely primarily on the Eleventh Circuit's rejection of an *express* per se warning requirement, Resp. Br. 16-18, and their claim that the Eleventh Circuit has

considered individual circumstances when applying the *Bostick* standard, *id.* at 20-21. As this Court has noted, however, there is nothing remarkable about an "ostensibly * * * highly fact-dependent totality-of-the-circumstances test[] approach[ing] a per se rule in application." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 373 (1998). And it is precisely such a "per se rule in application" that the Eleventh Circuit has established. Although Eleventh Circuit cases invalidating bus passenger consent searches are legion, see Pet. 22 n.2; Pet. Reply 8-9 & n.3; U.S. Br. 29-30, respondents cite not a single Eleventh Circuit decision upholding a bus passenger's consent as valid absent an explicit warning of the passenger's right to refuse cooperation.

Indeed, while respondents purport to identify ways officers can obtain valid consent absent a warning, Resp. Br. 20, their suggestions only underscore the per se nature of the Eleventh Circuit's rule. Respondents contend that officers can "approach passengers in the terminal" instead of on the bus, or should "stand with [a] drug dog as passengers reboard the bus." *Ibid.* By suggesting that officers should obtain consent by approaching passengers *outside* the bus, respondents tacitly acknowledge that officers cannot obtain valid consent from passengers on the bus. Respondents provide only one example of a circumstance under which an officer might validly obtain consent from a passenger on a bus. A passenger's consent might be valid, they suggest, if the officers ask the passenger to "volunteer" for a search. *Ibid.* In so doing, however, respondents are merely requiring that officers effectively inform the passenger of the right to refuse consent. Thus, far from proving that there is no per se warning requirement, respondents confirm it.

This Court has consistently refused to impose a judicial script on officer-citizen interactions in the Fourth Amendment context, finding it inconsistent with the "informal, unstructured context of a consent search." *Bustamonte*, 412 U.S. at 245; *Ohio* v. *Robinette*, 519 U.S. 33, 39-40 (1996) (labeling proposed warning requirement "thoroughly impractical" and "unrealistic"). Respondents argue that the police already script their interactions with bus passengers. Resp. Br. 26. The claim that Officer Lang "scripts" his interviews, however, is not supported by the record. And even if some police officers follow standardized practices, nothing in the Constitution requires every police officer in every State to employ a judicially approved script when seeking consent.

Respondents' claim that the imposition of a warning requirement would benefit officers and citizens, Resp. Br. 26 n.21, is also incorrect. Indeed, passengers might be confused or intimidated by incomplete or inarticulate warnings. U.S. Br. 33 n.6. The courts, moreover, would repeatedly be called upon to pass on the adequacy of warnings. For example, in *United States* v. *Stephens*, 206 F.3d 914 (9th Cir. 2000), the majority parsed the officer's warning and faulted it because the officer told passengers that they were "not under arrest" and were "free to leave," but added, "[h]owever, we would like to talk to you." *Id.* at 916. The warning, the majority stated, backfired by conveying the impression that passengers could avoid cooperating only by getting off the bus. *Ibid.* Respondents' proposal that the officers ask a passenger if he will "volunteer" for a search can be parsed similarly. It could be understood to imply that the alternative, if the passenger does not volunteer for the search, is for the search to proceed without voluntary consent.

To ensure that their warnings are not parsed in that manner, officers likely would have to read passengers a standard—and relatively comprehensive—form warning, as they do under *Miranda*. The reading of such a warning in the otherwise-informal context of cases like this one, however, may itself create intimidation. *Miranda* warnings are typically issued to individuals who are in custody; a passenger thus might perceive warnings as a sign that the encounter has progressed beyond a simple request for cooperation. Of course, officers may find it appropriate in certain cases to provide such advice before seeking voluntary cooperation, and the provision of a warning is a relevant

factor in the seizure determination, *Bostick*, 501 U.S. at 432. But the Constitution should not be held to mandate the administration of warnings, lest officers be required to read warnings that will make innocent people, in an otherwise voluntary and casual interaction, feel like they are suspects.

II. Respondents' Seizure Test Is Incorrect

In asserting that their encounter with Officer Lang was a seizure, respondents announce and apply an incorrect legal test. In *Bostick*, this Court held that "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—*so long as the officers do not convey a message that compliance with their requests is required.*" 501 U.S. at 437 (emphasis added). Notwithstanding that holding, respondents seek to replace the *Bostick* formulation with their own test. The proper measure of coercion in this context, respondents assert, is "whether a reasonable passenger would react any differently to the same behavior by a fellow traveler." Resp. Br. 39. The interaction in this case must have been coercive, they argue, because "a reasonable passenger would have told a total stranger" who was not an officer "to 'back off.'" *Ibid.*

Respondents cite no authority to support their proposed test, which would effectively convert all consent searches into seizures. There are few if any circumstances under which a passenger would allow a random fellow traveler to search his person or possessions. Yet this Court and the courts of appeals have routinely upheld similar searches by the police on the basis of voluntary consent. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980) (strip search); *United States* v. *Chhien*, 266 F.3d 1, 7-8 (1st Cir. 2001) (frisk); *United States* v. *Rodney*, 956 F.2d 295, 297 (D.C. Cir. 1992) (Thomas, J., joined by Ginsburg, J.); *United States* v. *Sturgis*, 238 F.3d 956, 958 (8th Cir. 2001); *United States* v. *Morgan*, 914 F.2d 272, 274-275 (D.C. Cir. 1990); *United States* v. *Gordon*, 895 F.2d 932, 937-938 (4th Cir. 1990). See also U.S. Br. 20-21.

Respondents' proposed test rests on the mistaken premise that, if passengers respond differently to an officer's request for consent than they would to a total stranger's request, that difference must result from the officer's coercive authority. But citizens respond differently to an officer's request *not* because of coercion, but rather because law-enforcement officers have a legitimate reason for seeking consent to search—the need to ensure public safety and apprehend criminals—whereas another private citizen typically does not. "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime." *Bustamonte*, 412 U.S. at 243. Bus passengers thus readily consent to having their person or possessions searched, because they know it enhances everyone's interests. See J.A. 73 ("[W]e have people saying that they appreciate it because it makes them feel safe on the bus."); J.A. 100 (similar); U.S. Br. 4.[1]

For similar reasons, respondents' emphasis on the fact that the search in this case was a frisk (Br. 39) is beside the point. To the extent respondents imply that the officer

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[1] Buses are among the forms of public transportation increasingly targeted for acts of violence. See *6 Die in Greyhound Bus Crash After Attack on Driver*, Washington Post, Oct. 4, 2001, at A02; *Bus Passengers Overpower Man In Attempted Hijacking*, Washington Post, Oct. 19, 2001, at A05; *Smoker Hijacks Greyhound Bus*, The Indep. (London), Nov. 6, 2001 (reporting "the third Greyhound hijack attempt in a month"). Passenger interviews and consent searches are effective in preventing attacks. See Testimony of Isaac Yeffet, Former Director of General Security for El Al Airlines (Nov. 27, 2001) (2001 WL 26187904) ("passenger interview process is very important in achieving the first step of terrorist prevention"); Br. Wash. Legal Found. 5-7. Recognizing the threat and the resulting need for public cooperation, the traveling public is happy to assist. *Two Approaches to Security*, Business & Comm. Aviation, Nov. 1, 2001 (most people "are very understanding" and "don't mind the inconvenience to be safe and secure"); *Federalized Screeners Likely to Come*, American Political Network—The Hotline, Oct. 30, 2001 ("passengers were very aware" that searches are "for their safety and benefit and are very willing to cooperate").

frisked respondents' crotches, that is incorrect. J.A. 101 ("[Defense counsel] asked you about searching the defendant's groin areas. Were you searching the area, the male private parts? A. No, Sir."). Instead, the record shows that Lang frisked the "upper parts of [respondents'] legs," along "the crease on the front of the pants from the waistband down," J.A. 61, *i.e.*, the "front part of the thigh," J.A. 144. In any event, respondents do not explain how the nature of the frisk shows that the police, before seeking consent, "communicated the message" that the frisk was mandatory. To the extent respondents are arguing that frisks are so intrusive that "*no one* traveling on public transportation—who was free to do otherwise—would likely consent," Br. Opp. 10, they are simply arguing that all consent pat-downs are coerced. Respondents thus do not seek to vindicate the right of passengers to refuse consent. Instead, they seek to deprive passengers of the right validly to grant it.

III. Respondents' Claim That They Were Seized Is Unsupported By The Facts Or Law

Respondents argue that three main factors lead to the conclusion that they were seized: that the encounter took place on a bus; the absence of advice of their right to refuse consent; and the officers' purported show of authority. Resp. Br. 24-39. Neither alone nor in combination do those factors show circumstances "so intimidating as to demonstrate that a reasonable person would have believed" cooperation to be mandatory. *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). Indeed, respondents' contrary argument rests primarily on factual claims that are not supported—and are frequently contradicted—by the record.

A. Absence of Warnings. Respondents begin by arguing that "there are psychological and practical forces * * * which render bus sweeps * * * a highly coercive environment," Resp. Br. 25, such that a warning of the passengers' rights is necessary. Respondents' primary support for the assertion that the bus environment is psychologically coercive, however, is their unsubstantiated claim that a

passenger "who does not wish to be either 'engaged' or 'searched' has no option but to try to ignore the officer or be rude to him." *Ibid.* Respondents overlook the most obvious option, which is for the passenger to tell the officer (politely) that he is not interested in talking. Nothing prevented respondents from pursuing that course of action in this case. And the officers did nothing to prevent or even discourage it.

B. Location. To support a claim of officer coercion, respondents focus extensively on the location of the encounter—*i.e.*, the fact that it took place on a bus—faulting the officers for not approaching respondents in the terminal. Resp. Br. 26-28. The record, they state, "suggests" that the officers "deliberately chose to wait to seek respondents' consent until after [respondents] were in a vulnerable position" on a bus. Resp. Br. 28. But respondents never suggested in district court that the officers targeted and followed them to the bus; the court of appeals did not accept or rely on that theory; and the record refutes it. As respondents conceded below, Brown C.A. Br. 12 n.4, Officer Lang testified that he had *not* targeted anyone. J.A. 105 ("Did you have anybody targeted or anything like that? A: No, sir.").[2]

Equally unfounded is respondents' reliance on *Florida* v. *Royer*, 460 U.S. 491 (1983). In *Royer*, the police specifically relocated the passenger to a small enclosed area, creating a situation in which the passenger might feel that his freedom of movement was restricted. See *id.* at 504-505. Here, in

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[2] Respondents now suggest that this fact may be disputed. See Resp. Br. 7 n.8. But in making that claim (and many others), respondents appear to rely on the record of Drayton's trial. Because that trial record was *not* before the district court when it ruled on respondents' motion to suppress, and neither Drayton nor Brown renewed the motion following Drayton's trial, the trial record has no bearing on the correctness of the suppression ruling. See *United States* v. *Smith*, 80 F.3d 215, 220 (7th Cir. 1996) ("When the defendant fails to renew at trial the motion to suppress," reviewing courts "should not rely on evidence first produced at trial to reverse a pre-trial denial of motion to suppress."); *United States* v. *Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1993) (same); 5 W. LaFave, *Search & Seizure* § 11.1(b), at 14 (3d ed. 1996) (similar).

contrast, respondents themselves chose to board the bus. Consequently, while respondents' "movements were 'confined' in a sense," that "was the natural result of [their] decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Bostick*, 501 U.S. at 436.

Respondents' reliance on the allegedly "minimal" number of passengers who refuse consent, Resp. Br. 27, is similarly miplaced. The grant of consent shows citizen cooperation, not police coercion. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, 466 U.S. at 216. Respondents, moreover, provide no evidence that passengers on buses consent to searches more frequently than passengers in terminals. See also U.S. Br. 26.

Finally, respondents contend that the officers "seized" all of the passengers by preventing the bus from leaving on time. Resp. Br. 29-30 & n.23. But respondents did not raise that argument before the trial court; the court of appeals never addressed it; respondents did not make that claim in opposing the petition for a writ of certiorari; and the only witness at the suppression hearing testified that the officers did *not* delay the bus. J.A. 69 ("[D]o you ever stay on the bus so long that the bus has to leave late? A. No. Sir."); J.A. 49 ("I can't detain the bus."); see also J.A. 70 (officers will not enter bus if driver is ready to leave); J.A. 79 ("When we see the driver coming up, we are usually about finished, or we're ready to get off the bus anyway.").

Respondents assert that the officers inevitably delayed the bus because (according to them) the officers entered the bus at 12:40 p.m., the bus was scheduled to leave at 12:45 p.m., and the officers ordinarily spend 15-20 minutes on a bus. Resp. Br. 29-30. Respondents provide no evidence that the officers in this case spent more than five minutes on the bus. (Lang testified that officers "try *not* to stay on there 15, 20 minutes." J.A. 70 (emphasis added).) And respondents

cite no evidence that the bus driver, who left to complete paperwork at the same time the officers boarded, Pet. App. 3a; J.A. 78, had returned before respondents' arrests.

Respondents also err in equating a delay in the bus's departure with a seizure of the passengers on board. Resp. Br. 29-30 & n.23. So long as a bus driver *voluntarily* chooses to delay the bus, there is no Fourth Amendment seizure. Having chosen to place themselves on a vehicle in the bus company's and the bus driver's control, respondents have no Fourth Amendment right to dictate the driver's decision about departure time—whether that decision is made for the driver's own reasons, or out of a voluntary desire to assist law enforcement. See *United States* v. *Hernandez*, 215 F.3d 483, 487-488 (5th Cir.), cert. denied, 531 U.S. 1038 (2000). Furthermore, even if officers invoke their authority to require a delay, the passengers are not seized when they remain free to get off the bus, to walk away (or choose some other means of transport), and to refuse cooperation if the police make a request of them. Under respondents' contrary theory, passengers would be "seized" every time a city-owned and operated bus runs late; automobile drivers would be "seized" whenever the government closes a road; and airplane passengers would be "seized" if the Federal Aviation Administration requires the cancellation of a flight or the closing of an airport.

C. Show of Authority. Given the limited significance of the absence of warnings and the location of the encounter, respondents must place primary weight on a supposedly coercive "show of authority" by the officers. Resp. Br. 28-40. In their effort to do so, however, respondents distort both the nature of the police conduct at issue here and how a reasonable person would interpret it.

1. *The officers' entry.* Respondents begin by criticizing the officers' means of entering the bus. The entry of "multiple unticketed men * * * en masse," they contend, was "at the least confusing and intimidating." Resp. Br. 29. The court of appeals' decision, however, is devoid of any sug-

gestion that the officers entered the bus in an intimidating manner, and the district court expressly rejected any such claim. The plainclothes officers, that court explained, entered just after the passengers and "could have been mistaken for other passengers." J.A. 126. That conclusion was fully supported by Officer Lang's testimony, J.A. 108 ("We boarded the bus just like we were passengers"), and respondents make no effort to show clear error.[3]

2. *The officers' positions.* Respondents' reliance on the officers' positions inside the bus is also factually and legally unsupported. According to respondents, the officers were "strategically located to effectively surround the passenger," Resp. Br. 30, because two officers (Lang and Blackburn) went to the back, while another (Hoover) kneeled in the driver's seat, facing back toward the passengers, without blocking the exit. Resp. Br. 30-31. Contrary to respondents' intimation, Officer Hoover stayed at the front to ensure the safety of the other officers, Pet. App. 3a, *i.e.*, "to check and make sure that there was no threat to the officers whose backs were turned," J.A. 130, not to surround passengers. There is no evidence that respondents saw Hoover—who may not have been easy to see from the back of the half-full bus—much less that they recognized that Hoover was an officer in civilian clothes. U.S. Br. 25-26; J.A. 45 ("Is there anything that would prevent or make it difficult for the passengers to see Investigator Hoover in that position. A. To see him—if you're not actually looking, yes, because there's a panel."). And Officers Lang and Blackburn went to the back of the bus to avoid blocking the aisle while speaking with passengers, as required by the Eleventh Circuit's decision in

[3] Respondents also rely (Br. 3, 36 n.29) on their claim that the bus driver told the officers that the bus was "all yours." Officer Lang testified that drivers usually will say *either* "'It's all yours,' something like that, *or*" will respond to a request for permission to enter by "say[ing] 'Yes,' because at that time he's going into the office." J.A. 78. Further, there is no evidence that respondents (sitting near the back of the bus) heard any comment the bus driver made to the officers outside the door at the front.

Guapi. See 144 F.3d at 1396 (criticizing officers for beginning interactions at the front of the bus, because it did not permit "those passengers who felt uncomfortable with the procedure to exit without confronting the police").

This Court has rejected the claim that the presence of an officer near an exit necessarily effects a seizure by suggesting an "intent to prevent people from leaving." *Delgado*, 466 U.S. at 218. As the Court explained, "[t]he presence of agents by the exits" while other agents interview the individuals inside "pose[s] no reasonable threat of detention"; "the mere possibility that" people might "be questioned if they sought to leave * * * should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." *Id.* at 219. If the presence of *armed* INS agents near the exits did not result in a seizure in *Delgado*, it is difficult to see how the presence of a plainclothes officer in the bus driver's seat with no visible weapons might contribute to the finding of a seizure here. See U.S. Br. 25-26.

Respondents attempt to distinguish *Delgado* (Br. 31) by asserting—without citation—that one of the plaintiffs there was "free to move about a large factory" and passed "unquestioned through factory doors," whereas respondents here "were not free to ignore the officers." But that supposed distinction assumes the very conclusion respondents seek to prove—that respondents "were not free to ignore the officers." In this case, the passengers were free to move around the bus, to ignore the officers, and to get off the bus. Indeed, passengers "often exited the bus while the officers were on it." Pet. App. 8a. If Hoover's presence communicated to passengers that they were confined to the bus, passengers would not "always" be "getting up and getting off the bus"—"every day"—the "whole time" the officers were on it. J.A. 81; U.S. Br. 26.

Respondents' claim that the other officers "[c]onstructively [b]locked the [a]isle," Resp. Br. 31, is likewise without merit. Both courts below found that the officers did not

block the aisle. The district court found that it was "obvious" that respondents could "get up and leave, as [could] the people ahead of them." Pet. App. 13a; J.A. 132. The court of appeals concurred. Pet. App. 3a ("The officers did not block the aisle."). It may be that passengers *behind* Lang would have had to ask him to "let [them] pass in the narrow aisle," Resp. Br. 32, but respondents were *not* behind Lang when they spoke with him. Instead, Lang "stood next to or behind" respondents, Pet. App. 3a, so that respondents could "get up and leave" at any time, Pet. App. 13a; J.A. 132.[4]

3. *Demeanor and tone.* Respondents concede that Lang's "plain clothes, quiet tone, and polite demeanor appear to weigh against finding a seizure." Resp. Br. 31. Contradicting that concession, respondents later claim that Officer Lang's voice was sufficiently loud as to be "intimidating when delivered * * * at a very close distance." Resp. Br. 35. The court of appeals, however, specifically stated that Lang's voice was "*just* loud enough for [respondents] to hear." Pet. App. 4a (emphasis added). Officer Lang testified that he used a polite tone that was not designed to carry beyond the individuals with whom he was speaking. J.A. 51-52, 58. And the district court found "nothing in [Lang's] tone of voice" to suggest bullying or abuse. Pet. App. 13a; J.A. 132. Respondents' further claim (Br. 37-38) that Lang had an "in your face" style similarly misconstrues the record. U.S. Br. 19 n.2. Respondents misleadingly omit Lang's actual testimony and the clarification that followed. Officer Lang's response to the question put to him shows that he misunderstood it, J.A. 56-57, and the Assistant United

[4] Respondents now speculate (Br. 32 n.25) that there might have been a drug-sniffing dog outside the bus. Respondents cite no evidence of any dog—"intimidating" or otherwise—from the hearing on the motion to suppress (see note 2, *supra*); respondents never relied on the alleged dog in the courts below; and they provide no evidence of the dog's location, much less evidence that it was nearby, or that any passenger was aware of it. The fact that respondents were not subjected to a dog-sniff when they were taken off the bus, moreover, suggests that there was no dog nearby.

States Attorney immediately asked a clarifying question: "I think the question the judge was asking, was there anything confrontational about your discussions?" Lang answered "No, sir. No, sir." J.A. 57. See also J.A. 58 ("I'm being friendly and courteous, and I'm using 'How are you doing?' * * * a nice tone of voice."). The court of appeals did not suggest that Lang was overbearing or confrontational, and the trial court—which heard the testimony and observed Lang's demeanor during a re-enactment of the encounter—expressly found that there was "nothing coercive" or "confrontational" about it. Pet. App. 13a; J.A. 132.

4. *The officer's conduct.* Respondents do not dispute that Lang carefully avoided intimidating movements; did not show a weapon; and in fact dressed to ensure that his firearm and handcuffs were shielded from view. See *Bostick*, 501 U.S. at 437 (emphasizing that the officers "did not point guns at Bostick or otherwise threaten him"). Respondents nonetheless claim that Lang's conduct contributed to a seizure because citizens generally *expect* officers to be armed. Resp. Br. 31. But this Court has held that police-citizen interactions are consensual so long as the "*officers* do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 437 (emphasis added). See also *id.* at 439 (inquiry is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter"). The fact that *citizens* may speculate about the presence of weapons or other potential sources of intimidation, through no fault of the officers, cannot convert an otherwise consensual encounter into a seizure. Cf. *Colorado* v. *Connelly*, 479 U.S. 157, 164-166 (1986) (confession cannot be involuntary absent police over-reaching; state action a critical component of coercion).

Respondents also fault Officer Lang for showing respondents his badge, claiming that it "reinforce[d] Lang's authority over them." Resp. Br. 33-34 & n.27. Respondents do not argue that Officer Lang displayed his badge in a manner that

was unusual; they fault him for showing it at all. It is, however, customary and appropriate for officers—particularly those wearing plainclothes—to begin interactions with citizens by identifying themselves and showing their official identification. Doing so ensures that each citizen understands that he is dealing with a law enforcement officer rather than a potentially threatening stranger. U.S. Br. 23; see also pp. 6-7, *supra*. Failure to do so would be both inappropriate and risky.

Respondents' claim that an officer can effect a seizure merely by showing a badge is without merit. Officers effect seizures not by offering proof that they are law enforcement officials, but by *invoking* their official authority or *applying force* to restrain the passengers' liberty. See U.S. Br. 22-23. The officers began the interactions at issue in *Delgado* and *Florida* v. *Rodriguez*, 469 U.S. 1 (1984), by identifying themselves and showing their badges. *Delgado*, 466 U.S. at 212-213; *Rodriguez*, 469 U.S. at 4, 6-7. Yet in each of those cases, this Court held that the encounter was consensual.

Although respondents assert that it was not necessary for Lang to show his badge because passengers would necessarily "realize Lang was a police officer" based on his conduct, Resp. Br. 33 n.27, that is not true. At a minimum, Lang had to identify himself to the *first* passenger he contacted (at the back of the bus). Lang appropriately followed the same procedure when introducing himself to each successive passenger as he moved forward. Because Lang spoke with each passenger quietly, there was no reason for him to assume that passengers heard or understood his earlier conversations with other passengers. And he surely had no way of knowing whether each and every passenger he approached had been paying attention to the earlier interactions behind them, much less such close attention as to be satisfied that Lang was a genuine police officer.

5. *Distance.* Respondents similarly err in emphasizing the limited distance (12-18 inches) between Officer Lang and respondent Brown. See Resp. Br. 34; see also *id.* at 33 n.26.

In the sometimes noisy confines of a bus, 12-18 inches is the ordinary distance from which an individual in the aisle would converse with a seated passenger. Indeed, since respondents claim that the aisle was only 15 inches wide, see Resp. Lodging at 8, Lang could not have stood further away without bending backwards in an impossible contortion or sitting in the lap of the passenger across the aisle. Nothing in the Fourth Amendment requires an officer to engage in impossible gymnastics when conversing with citizens.[5]

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[5] Respondents include in their lodging a so-called "photographic array" dramatizing an encounter between three individuals posing as police officers and two mock passengers on an (otherwise empty) bus. The "array"—which was never introduced in district court and has never been authenticated as an accurate reflection of the events of this case—grossly distorts the interaction between Officer Lang and respondents. For example, the first picture of the mock interaction (Lodging at 3, lower photo) shows the officer standing ahead of and to the side of the passenger, facing toward and looming over him. One of the officer's arms is extended around and in front of the passenger to display a badge, so that the passenger would have to swat it out of the way if he wanted to leave; and the officer's other arm rests on the back of the passenger's seat. The officer's position is entirely incorrect. Officer Lang was not ahead of respondents when he spoke to them, but next to and slightly behind them. J.A. 131-132, 142; Pet. App. 3a. Officer Lang's body was not turned toward the passengers so as to wrap around them, as in the photos. Instead, he directly faced the front of the bus. J.A. 56 ("I want the record to reflect Officer Lang is standing with his back to the rear of the bus and facing the front of the bus."). The district court thus observed that Lang was "not coming up and face to face with" respondents but instead was "talking to them from kind of their right side," a position that required respondents to turn their heads to converse with Lang, see *ibid.* (Brown's "head was turned towards me"). Further, there is no evidence that Lang extended his arm or badge around and in front of respondents as shown in the picture. There is no evidence Lang loomed over the passengers rather than bending sufficiently to be at or near their level. And there is no evidence that Lang put his arm around the passenger's seat. Respondents appear to have added those features on their own. The photographs similarly exaggerate the prominence of the officer at the front of the bus (Lodging at 2, lower photo) by using an empty bus. In this case, the bus was half full, so the heads of the other passengers would have obstructed any view of Officer Hoover at the front. The individual purporting to

6. *Identification of baggage.* Respondents also complain that Officer Lang attempted to match bags with passengers. Resp. Br. 34-35. They speculate that, if they had not identified Brown's bag as theirs, Lang might have held it up, asked who the owner was, and deemed it abandoned when no one claimed it. *Ibid.* That argument was neither pressed nor passed upon below. Further, no such event happened. Lang never held up or pointed to a bag and asked passengers to claim it. He merely asked respondents whether they had bags on the bus. Pet. App. 3a; J.A. 55-56. Nothing compelled respondents to answer that question or to point at their bag in response. They could have just as easily told Lang that they were not interested in speaking with him. Besides, there is nothing unreasonable about ensuring that every bag on a bus corresponds with an actual passenger.[6]

7. *Request for consent.* Respondents also fault the precise language Officer Lang used when seeking consent. Resp. Br. 36-37. But respondents fail to identify *anything* Lang said to imply that cooperation was mandatory. Instead, respondents criticize him for not telling respondents "that they did not have to consent to the encounter" and for not asking "[w]ill you cooperate." Resp. Br. 37. That is just another way of claiming that officers must warn citizens of their right to refuse cooperation.

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represent Hoover, moreover, appears to be sitting on his knees in an erect fashion. Officer Hoover in fact sat "*on his haunches, leaning* on the back of the driver's seat." J.A. 46 (emphasis added). And all the photographs exaggerate the closeness of the interactions by using an officer and an aisle passenger who are—unlike respondents and Officer Lang—rather portly.

[6] Passengers have no Fourth Amendment right to demand that their bags travel anonymously. See Br. Wash. Legal Found. 19-20. See also Wash. Post, Dec. 29, 2000, at A1 (packages containing bombs left on bus); Wash. Post, Nov. 24, 1996, at C03 (recommending bag-passenger matching as safety precaution). And even if some means of bag matching might give passengers reason to acknowledge ownership, respondents do not explain how those procedures would also communicate to passengers that they must consent to a search of their bags (or their persons).

Respondents' claim that Officer Lang employed the technique of "phased commitment" to obtain consent, Resp. Br. 38 n.32, is equally unfounded. Lang introduced himself and asked only three questions—whether respondents had a bag on the bus, whether he could search it, and whether he could frisk respondents for weapons. Pet. App. 4a-5a; J.A. 55-56, 59-61. There is no suggestion that Lang began with a series of innocuous requests to break down resistance to more intrusive ones. See J.A. 50-51.

Respondents also claim that Lang, after asking for consent, "did not wait for an answer." Resp. Br. 37, 42-43. In so doing, respondents do not argue that their consent was the product of a seizure; they argue instead that there was no consent at all. Both courts below, however, concluded that Lang waited for and received consent. Officer Lang "requested and received permission from Brown to conduct a pat-down." Pet. App. 5a. Indeed, when Lang asked Brown for consent, Brown said "Sure," pulled a cell phone out of his pocket, and opened his coat. J.A. 61-62. Similarly, when Lang asked Drayton for permission to perform a pat down, Drayton responded (non-verbally) by lifting his hands off his legs to permit the search. Pet. App. 5a. The district court thus found that respondents "consented to this search," *id.* at 14a; J.A. 133, and respondents show no clear error.

Finally, respondents argue that *Drayton's* consent was invalid because Officer Lang leaned across him—and thus prevented him from standing—when frisking Brown. Resp. Br. 39. Furthermore, they note that, before seeking Drayton's consent, Officer Lang arrested Brown and had him escorted off the bus. *Id.* at 40; J.A. 64-65. The court of appeals addressed neither of those claims, and neither claim suggests that Drayton was seized when he consented to the search. Even if Lang's pat-down of Brown inadvertently and momentarily prevented Drayton from leaving, the pat-down had ended and Drayton was free to leave or refuse cooperation when Lang asked him for consent. The arrest of one bus passenger, moreover, hardly implies that everyone

around him is under arrest. Thus, Drayton had no reason to think that, after the officers took Brown off the bus but left him on it, he was under arrest as well.[7]

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For the foregoing reasons and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2002

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[7] Respondents also argue (Br. 43-44) that a defendant's consent cannot validate a search if that consent was given during an illegal seizure. That issue is not presented by this case; the question here is whether there was an illegal seizure in the first place. See U.S. Br. 33 n.5.

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